Supreme Court, U. S.
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MICHAEL RODAK, JR., CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1977

No. 77-1382

JACK B. BALLARD - - - - - Petitioner

versus

UNITED STATES OF AMERICA - - Respondent

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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SUPREME COURT OF THE UNITED STATES

October Term, 1977

No._____

JACK B. BALLARD - - - - - *Petitioner*

v.

UNITED STATES OF AMERICA - - *Respondent*

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

The petitioner, Jack B. Ballard, respectfully prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Eighth Circuit, entered in this proceeding on February 3, 1978.

OPINIONS BELOW

The Order and Opinion of the Court of Appeals in the instant action, entered on February 3, 1978 (Appendix A) is not officially reported. The Order of the Court of Appeals overruling petitioner's Petition for Rehearing was entered on February 27, 1978 (Appendix B). The Mandate herein was issued on March 7, 1978 (Appendix C). The Order and Opinion of the

Court of Appeals, entered on April 28, 1976 in petitioner's direct appeal (Appendix D) is reported at 535 F. 2d 400.

JURISDICTION

The Order of the Court of Appeals for the Eighth Circuit (Appendix A) was entered on February 3, 1978; and a timely Petition for Rehearing was denied by Order of the Court of Appeals for the Eighth Circuit (Appendix B) on February 27, 1978, the mandates being issued on March 7, 1978 (Appendix C).

This Court's jurisdiction is invoked pursuant to 28 U.S.C. Sec. 1254(1).

QUESTION PRESENTED

I. Whether petitioner's post-conviction motion based on newly discovered evidence under Fed. R. Crim. Proc. 33 should have been sustained where the undisputed evidence strongly indicated that petitioner might have been convicted by perjured testimony unexpectedly given at trial by a material government's witness.

STATUTES AND CRIMINAL RULE INVOLVED

Statutes of the United States

Title 26, United States Code

Sec. 7203 Willful failure to file return, supply information, or pay tax.

Any person required under this title to pay any estimated tax or tax, or required by this title or by regulations made under authority thereof to make a

return (other than a return required under authority of section 6015), keep any records, or supply any information, who willfully fails to pay such estimated tax or tax, make such return, keep such records, or supply such information, at the time or times required by law or regulations, shall, in addition to other penalties provided by law, be guilty of a misdemeanor and, upon conviction thereof, shall be fined not more than $10,000, or imprisoned not more than 1 year, or both, together with the costs of prosecution.

Sec. 7206. Fraud and False statements.

Any person who—

(1) Declaration under penalties of perjury—Willfully makes and subscribes any return, statement, or other document, which contains or is verified by a written declaration that it is made under the penalties of perjury, and which he does not believe to be true and correct as to every material matter; . . . shall be guilty of a felony and, upon conviction thereof, shall be fined not more than $5,000, or imprisoned not more than 3 years, or both, together with the costs of prosecution.

Fed. Rules Cr. Proc.

Rule 33, New Trial

The court on motion of a defendant may grant a new trial to him if required in the interest of justice. If trial was by the court without a jury the court on motion of a defendant for a new trial may vacate the judgment if entered, take additional testimony and direct the entry of a new judgment. A motion for a new trial based on the ground of newly discovered evi-

dence may be made only before or within two years after final judgment, but if an appeal is pending the court may grant the motion only on remand of the case. A motion for a new trial based on any other grounds shall be made within 7 days after verdict or finding of guilty or within such further time as the court may fix during the 7-day period.

STATEMENT OF THE CASE

After a five-day jury trial, April 14-18, 1975, petitioner Ballard was found guilty in the district court of a two-count indictment charging violations of sec. 7206(1) of Title 26, United States Code, in that he "did willfully and knowingly make and subscribe a United States Individual Income Tax Return, Form 1040, for the calendar" years 1969 (count 1) and 1970 (count 2), "which was verified by a written declaration that it was made under the penalties of perjury and was filed with the Internal Revenue Service, which said income tax return he did not believe to be true and correct as to every material matter in that the said return reported gross income from wages" in certain amounts, "whereas, as he then and there well knew and believed, he received substantial income in addition to that heretofore stated."

The jury deliberated for 9 and a half hours before returning its guilty verdict. During the deliberations the jury requested the trial court to clarify a certain portion of petitioner's testimony in reference to one of the most significant issues in the case, but the trial judge denied that request.

The government presented 48 witnesses plus a great amount of documentary evidence. Petitioner testified in his own behalf and presented two other defense witnesses.

Essentially, the evidence showed that during 1969 and 1970 several businesses had paid petitioner for various services and goods and that petitioner had neglected to pay income tax on the payments received. Petitioner's defense was that, since he was honestly unaware of the requirement of listing business losses on a Schedule C form, he lacked specific intent to break any of the internal revenue laws.

All of the government's witnesses, save one, testified that the transactions in issue had been consumated by check in a routine business fashion. The exception was Jasper Cillo, a St. Louis businessman who incidentially is himself presently under a multi-count indictment for allegedly stealing from the city by falsifying expenses.

Mr. Cillo was the most damaging government's witness. He testified that he had leased certain property from petitioner for a four-month period and that he had paid petitioner the monthly rent payments in cash rather than by checks.

As stated, the jury reached a guilty verdict after nine and one half hours of deliberations. On August 7, 1975, the trial court formally sentenced petitioner to a three-year prison term on each count, to run concurrently, and a $2,000 fine on each count, to be cumulative for a total fine of $4,000.

Petitioner then filed his notice of appeal to the United States Court of Appeals for the Eighth Circuit.

On April 28, 1976, a panel of the Court of Appeals filed an opinion (Appendix D) affirming petitioner's conviction as to count 1 but reversing and remanding as to count 2. The Court of Appeals decided that the failure of the district court to give an instruction that the jury must consider cost of goods sold was not prejudicial as to 1969, but such omission was prejudicial as to 1970 and constituted plain error. Petitioner filed a petition for rehearing and suggestion of appropriateness of rehearing in banc, but same was denied on June 2, 1976.

Seeking a review of that denial, petitioner filed a petition for a writ of certiorari in this Court. On November 1, 1976, this Court denied petitioner's application for certiorari relief.

Complying with the orders from the sentencing court petitioner surrendered himself to the superintendent of the United States Medical Center at Springfield, Missouri on November 26, 1976, to begin service of his sentence.

Shortly following his commitment to the Medical Center, petitioner, for the very first time, discovered that the government's witness Cillo had been interviewed by a St. Louis *Post-Dispatch* newspaper reporter prior to trial and that a subsequently appearing article quoted Cillo as having made certain statements which were in direct contradiction with his trial testimony. Petitioner, as soon as was possible, secured a copy of the said newspaper article from the offices of the *Post-Dispatch* (Appendix E).

Next, petitioner hired an investigative firm for the purpose of interviewing the witness Cillo. During the

attempted interview Mr. Cillo was reluctant to speak with the investigator, saying that if he were to talk with the investigator, he would "liable to perjure" himself (Appendix F).

Petitioner, using the newspaper article and investigative report as exhibits, filed pro se with the district court a motion for new trial pursuant to Fed. Rules Cr. Proc. rule 33 wherein he alleged that Mr. Cillo's testimony was false and that it resulted, or at least might have resulted, in petitioner's conviction, thus being valid grounds for a new trial or alternatively for an evidentiary hearing on the motion. The trial court, however, summarily overruled this motion. Notice of Appeal was timely filed and an appeal to the Eighth Circuit Court of Appeals was duly perfected.

On February 3, 1978, The Court of Appeals affirmed the lower court's decision (Appendix A). Petitioner sought a rehearing or hearing in banc, but that petition too was denied (Appendix B). The Court of Appeals' mandate was issued on March 7, 1978 (Appendix C).

This petition for a writ of certiorari seeks to review the judgment of the Eighth Circuit Court of Appeals affirming the district court's denial of petitioner's motion for new trial under rule 33, Fed. Rules Cr. Proc.

REASONS FOR GRANTING THE WRIT

1. The petitioner's post-conviction motion for new trial, based on the ground of newly discovered evidence, should have been sustained in that his conviction was obtained by perjured testimony surprisingly given at trial by a prosecution witness who was the strongest link in the government's otherwise weak case.

2. This Court now has the opportunity to resolve the apparent conflict among the Courts of Appeals regarding the important legal question presented herein.

I.

The pertinent part of the false testimony given by government witness Jasper Cillo was as follows (Appendix G):

Q. Now, have you ever had occasion to rent any property from Mr. Ballard?

A. Yes, sir, I rented a piece of property on 3901 North Broadway.

Q. Do you recall what the months were that you rented it?

A. It was in—I rented it for four months in 1969 and 1970.

Q. Do you recall what the months were that you rented it?

A. October, November, December, and then right into '70—or in November, right in through there.

Q. To whom did you pay the rental on that property?

A. To Mr. Ballard.

Q. In what form did you pay that rental?

A. Cash.

Q. What was the amount of the rental?

A. Four-hundred and twenty-five dollars a month.

Q. How often did you pay this cash to Mr. Ballard?

A. The first day of every month.

Q. For the four months that you have indicated?

A. Right.

Q. To whom would you deliver the money?

A. To Mr. Ballard.

* * *

Q. Is that the affidavit that you gave to the Internal Revenue Service?

A. Yes, sir.

Q. And at the time you gave that affidavit, I'd like to ask you—have you look at that affidavit and see if that refreshes your recollection as to when you commenced renting this property.

A. Yes, sir, this is the exact year, November to February. I'm just away by one month. It was four months total.

Mr. Cillo's testimony, above quoted, was false. It was not only material but was clearly the strongest and most damaging element in the government's case against petitioner. The testimony came as a total surprise to petitioner, and he therefore was unable to meet it at trial. The jury would have "probably" or at least "might have" reached a different result without this perjurious testimony.

Cillo was the only witness who claimed to have dealt with petitioner in cash. The other government witnesses who had similarily conducted business with peti-

tioner testified that all transactions had been consummated by checks. Introduction of evidence showing receipt of cash income would have, to the average juror in a tax case, implications far more serious than introduction of evidence revealing income derived solely from payments made by checks.

Cillo's was the only testimony concerning rent payments received by petitioner. The other evidence was connected with services performed or goods sold.

Cillo testified that he had paid petitioner four months rental, while petitioner himself testified that he received only two months rental from Mr. Cillo. This contradiction was plainly fatal to petitioner in that it had the effect of undermining his testimony as a whole. The jury had every right to believe Cillo over petitioner on the theory that petitioner, to save his own skin, was probably the one who was lying.

Petitioner has presented sufficient evidence demonstrating the falsity of Cillo's testimony. The newspaper article (Appendix E), together with the investigative report (Appendix F), leaves no other conclusion but that Cillo outright lied at petitioner's trial. It should be noted that Cillo's statements which appeared in the newspaper article were consistent with petitioner's trial testimony. It is therefore obvious that Cillo maliciously changed his trial testimony in order to help convict petitioner. The investigative report (Appendix F) is further bona fide evidence that Cillo's trial testimony was false. The report reveals that Cillo, refusing to talk with the investigator, nevertheless went on to make the comment that "if I talk to you, you're liable to consider or *I'm liable to perjure myself.*"

Petitioner had no forewarning that Mr. Cillo intended to testify falsely and of course he was unprepared to cope with the surprise testimony. Only after petitioner was committed to prison did he learn of the existence of the newspaper article and ever since then he has diligently pursued all avenues for relief.

The fact that the jury deliberated for nine and a half hours lends credence to petitioner's argument that the government's case was weak to begin with. Mr. Cillo's false testimony, plainly the most prejudicial evidence against petitioner, was probably the determining factor in the jury's verdict. Petitioner contends now, as he did below, that without Cillo's perjurious testimony he would have probably avoided, or at least might have avoided, a conviction. In view of the foregoing, the Court of Appeals was in plain error in affirming the district court's denial of petitioner's rule 33 motion.

II.

The decision reached in this case by the Court of Appeals for the Eighth Circuit is in direct conflict with existing case law from the Court of Appeals for the Seventh Circuit. This Court should take this opportunity to resolve that conflict.

In 1851 the first precedent involving the legal question presented in the proceeding was established in *Berry* v. *State,* 10 Ga. 511, 527. The Eighth Circuit Court of Appeals has repeatedly applied the Berry rationale in deciding similar cases. See *United States* v. *McColgin,* 535 F. 2d 471; *United States* v. *Ward,* 544 F. 2d 975; *United States* v. *Frye,* 548 F. 2d 765.

On the other hand, the Seventh Circuit Court of Appeals has a completely different rationale for such cases. See *Larrison* v. *United States,* 24 F. 2d 82.

In the Eighth Circuit the law appears to be that a trial court should grant a post-conviction motion for new trial under rule 33, Fed. Rules Cr. Proc., only when the court is reasonably well satisfied that the evidence (1) is in fact newly discovered, i.e., discovered since the trial; (2) could not with due diligence have been discovered earlier; (3) is not merely cumulative or impeaching; (4) is material to the issues; and finally, (5) is such, and of such nature, that upon a retrial it *would probably produce* an acquittal.

In the Seventh Circuit Court of Appeals a different and less-stringent rule is the law. There it is found that a new trial under rule 33 should be granted where (1) the court is reasonably well satisfied that the testimony given by the material witness was false; (2) that without it the jury *might have reached* a different conclusion; and (3) that the party seeking the new trial was taken by surprise when the false testimony was given, and was unable to meet it or did not know of its falsity until after the trial. At least two other Courts of Appeals support the Seventh Circuit's reasoning. See *Newman* v. *United States,* 238 F. 2d 861 (5th Cir. 1956); *Gordon* v. *United States,* 178 F. 2d 896 (6th Cir. 1949).

On appeal petitioner urged the Eighth Circuit to decide his case under the Larrison standards as set forth by the Seventh Circuit. Petitioner argued that the five-prong test usually applied by the Eighth Circuit should not be applicable in his case because of the more serious nature of the newly discovered evidence, namely, perjured testimony.

The Eighth Circuit, however, in its written Order and Opinion (Appendix A) was careful to avoid a direct and published rejection of the Larrison rule. Instead the Court of Appeals applied its five-prong test which was formulated for typical claims of newly discovered evidence, even though perjured testimony was the legal issue. Clearly, a conflict between the Eighth and Seventh Circuits exists.

In 2 Wright, Federal Practice and Procedure, Sec. 557, p. 525, the law in this area for *all* circuits is clearly and unequivocally stated:

> If the motion [rule 33] . . . rests . . . on the ground that testimony at the trial was false, what is known as the "Larrison rule" applies. This is that three requirements must be met before such a motion will be granted:
>
> (a) The Court is reasonably well satisfied that the testimony given by a material witness was false. (b) That without it the jury might have reached a different conclusion. (c) That the party seeking the new trial was taken by surprise when the false testimony was given and was unable to meet it for it did not know of its falsity until after the trial.

The erroneousness of the Court of Appeals' decision lies in the test that was applied. Since the case involved the grave allegation of perjured testimony, as opposed to a general claim of newly discovered evi-

dence, the Court of Appeals should have applied the Larrison rule. There is a vast difference between evidence that "would probably" produce an acquittal on retrial and testimony that "might have" contributed to the conviction. See *United States* v. *Hiss,* 107 F. Supp. 128, affirmed on opinion below, 201 F. 2d 372.

In deciding a case similar to the case at hand one district court judge, Judge Van Dusen of the eastern district of Pennsylvania, went so far as to grant a new trial to a defendant on the ground that it was *possible* that the perjured testimony contributed to the conviction.

It was recognized in a more recent case, *United States* v. *Austin,* 387 F. Supp. 540, that "a motion for new trial on the basis of false testimony at trial must satisfy the requirements of the so-called 'Larrison rule'."

From the foregoing it is apparent that a conflict in decisional law between the Seventh and Eighth Circuit Courts of Appeals exists. In the interest of decision making and to accommodate diversities and conflicts occurring among the various Courts of Appeals, this Court should grant review in the present case. As things stand now, the dignity of the United States Government has been offended. It has allowed a person, petitioner Ballard, to be convicted on tainted testimony. *Mesarosh* v. *United States,* 352 U. S. 1, 77 S. Ct. 1, 1 L. Ed. 1.

CONCLUSION

Because of the reasons advanced above it is respectfully submitted that this petition for writ of certiorari be granted.

Respectfully submitted,

JACK B. BALLARD, PRO SE
5705 Rosa
St. Louis, Missouri

March 28, 1978

Supreme Court, U. S.
FILED
APR 5 1978
MICHAEL RODAK, JR., CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1977

No. 77-1382

JACK B. BALLARD - - - - - Petitioner

versus

UNITED STATES OF AMERICA - - Respondent

APPENDIX FOR PETITIONER

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APPENDIX A

UNITED STATES COURT OF APPEALS

FOR THE EIGHTH CIRCUIT

No. 77-1617

UNITED STATES OF AMERICA - - - - - *Appellee*

v.

JACK BALLARD - - - - - - - - *Appellant*

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF MISSOURI

Submitted: January 30, 1978
Filed: February 3, 1978

Before HEANEY, STEPHENSON and HENLEY, Circuit Judges.
PER CURIAM.

Jack Ballard appeals from the district court[1] order denying his motion for a new trial based on newly discovered evidence, filed pursuant to Fed. R. Crim. P. 33. We affirm.

In July, 1975 appellant was convicted of two counts of wilfully making and subscribing false income tax returns for the years 1969 and 1970, in violation of 26 U.S.C. § 7206(1). Appellant was sentenced to three years imprisonment on each count, with the sentences to be served

[1]The Honorable John F. Nangle, United States District Judge for the Eastern District of Missouri.

concurrently, and fined $2,000.00 on each count. On appeal, we affirmed the conviction on the 1969 count, but reversed the conviction on the 1970 count due to a faulty instruction. *United States* v. *Ballard,* 535 F. 2d 400 (8th Cir.), *cert. denied,* 429 U. S. 918 (1976). Appellant was not retried on the 1970 charge.

On July 18, 1977 appellant filed the instant motion for new trial based on newly discovered evidence. The motion alleged that one prosecution witness, Jasper Cillo, had given false testimony at trial. Attached as exhibits to the motion were a copy of a 1970 *St. Louis Post-Dispatch* article and an investigation report prepared by a St. Louis investigation organization subsequent to appellant's trial. On August 1, 1977 the district court denied the motion, and this timely appeal ensued. Appellant now contends that the district court erred in failing to grant the motion and, alternatively, that the district court erred by not holding an evidentiary hearing on the motion.

This court has repeatedly set out the relevant standards for granting a motion for a new trial based on newly discovered evidence as follows:

> (1) the evidence must be in fact newly discovered, that is, discovered since the trial; (2) facts must be alleged from which the court may infer diligence on the part of the movant; (3) the evidence relied upon must not be merely cumulative or impeaching; (4) it must be material to the issues involved; and (5) it must be of such nature that, on a new trial, the newly discovered evidence would probably produce an acquittal.

United States v. *Ward,* 544 F. 2d 975, 977 (8th Cir. 1976). *See also United States* v. *Frye,* 548 F. 2d 765, 769 (8th Cir. 1977); *United States* v. *McColgin,* 535 F. 2d 471, 476 (8th Cir.), *cert. denied,* 429 U. S. 853 (1976). In addition, the decision whether to grant such a motion is within the broad discretion of the trial court and will not be reversed absent a clear abuse of discretion. *See, e.g., United States* v. *Ward, supra; United States* v. *Bohn,* 508 F. 2d 1145, 1150 (8th Cir.), *cert. denied,* 421 U. S. 947 (1975).

Prior to applying these standards to the facts of this case, we briefly review Cillo's testimony at trial, the nature of the allegedly newly discovered evidence, and other evidence adduced at appellant's trial. At trial, Cillo testified that he rented some property in St. Louis from appellant from November, 1969 to February, 1970 and that he paid appellant $425.00 per month in cash. The newly discovered evidence consists of a February 12, 1970 article in the *St. Louis Post-Dispatch* in which Cillo is quoted as saying that appellant ordered Cillo evicted by January 1, 1970 and an investigation report which shows that Cillo refused to talk to the investigator and said, "if I talk to you, you're liable to consider or I'm liable to perjur [sic] myself."

At appellant's trial the government called forty-eight witnesses and introduced approximately sixty exhibits. The testimony and exhibits tended to show that appellant, doing business under several different names, had received approximately $55,000.00 in gross receipts during 1969. Indeed, appellant admitted having received $11,075.00 during this period. Appellant's defense was based largely on the theory that his failure to report these gross receipts was due to his good faith belief that since these receipts were offset by business losses he was not required to report them.

In view of the very substantial evidence of guilt, it is clear that neither the newspaper article nor the investigation report is the kind of evidence which would probably produce an acquittal on retrial. In addition, both the newspaper article and the investigation report are merely im-

peaching in nature.[2] Accordingly, the newly discovered evidence did not meet the standards for granting a new trial, and the district court properly denied the motion.[3]

The district court order is affirmed.

A true copy.

Attest:

CLERK, U. S. COURT OF APPEALS, EIGHTH CIRCUIT.

(UNPUBLISHED)

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[2]We further note that appellant has not alleged facts from which we can infer that, despite diligent effort, he failed to discover the existence of a newspaper article which had been in the public domain for five years prior to his trial.

[3]Appellant's contention that the district court erred in not holding an evidentiary hearing on the motion is without merit. A motion for a new trial based on newly discovered evidence may ordinarily be decided without an evidentiary hearing. *See United States* v. *Ward, supra,* 544 F. 2d at 976. No reason for departing from this general rule has been advanced here.

APPENDIX B

UNITED STATES COURT OF APPEALS

FOR THE EIGHTH CIRCUIT

No. 77-1617

September Term, 1977

UNITED STATES OF AMERICA - - - - - *Appellee*

v.

JACK B. BALLARD - - - - - - - - *Appellant*

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF MISSOURI

The Court having considered petition for rehearing en banc filed by appellant pro se and, being fully advised in the premises, it is ordered that the petition for rehearing en banc be, and it is hereby, denied.

Considering the petition for rehearing en banc as a petition for rehearing, it is ordered that the petition for rehearing also be, and it is hereby, denied.

February 27, 1978

APPENDIX C

[LETTERHEAD OF UNITED STATES COURT OF APPEALS—For the Eighth Circuit]

March 7, 1978

Hon. Robert C. Kingsland
U. S. Attorney
1114 Market St.
St. Louis, Mo.

Mr. Jack B. Ballard
5705 Rosa
St. Louis, Mo.

Re: No. 77-1617. U.S.A. v. Jack B. Ballard.

Dear Sirs:

The mandate of this Court in the above case is being issued today and sent to the Clerk of the United States District Court at St. Louis, Mo.

Very truly yours,

(s) Robert C. Tucker
Clerk

eh

APPENDIX D

UNITED STATES COURT OF APPEALS

FOR THE EIGHTH CIRCUIT

No. 75-1682

UNITED STATES OF AMERICA - - - - - *Appellee*

v.

JACK BALLARD - - - - - - - *Appellant*

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF MISSOURI

Submitted: February 12, 1976
Filed: April 28, 1976

Before BRIGHT, STEPHENSON, and HENLEY, Circuit Judges.

BRIGHT, Circuit Judge.

A two-count indictment charged appellant Jack Ballard with willfully making and subscribing false income tax returns for calendar years 1969 (count I) and 1970 (count II), in violation of §7206(1) of the Internal Revenue Code of 1954, 26 U.S.C. §7206(1).[1] Count I of the indictment

[1]That section, as applicable, reads:

Any person who—

(1) Declaration under penalties of perjury. Willfully makes and subscribes any return, statement, or other document, which contains or is verified by a written declaration that it is made under the penalties of perjury, and which he does not believe to be true and correct as to every material matter; • • • shall be guilty of a felony • • •.

alleged that for 1969, Ballard reported gross income from wages in the amount of $10,407, even though he "• • • knew and believed, he [had] received *substantial income* in addition to that heretofore stated." Count II alleged that Ballard's return for 1970 reported a gross income from wages in the amount of $20,730, whereas Ballard "knew and believed, he [had] received *substantial income* in addition to that [amount]." (Emphasis added.)

The jury convicted Ballard on both counts and the district court thereafter sentenced Ballard to three years' imprisonment on each count with the sentences to be served concurrently, plus a fine of $2,000 on each count.

Ballard appeals contending (1) that the grand jury proceedings were invalid; (2) that the Government failed to make a submissible case for the jury and that a fatal variance existed between the allegations of the indictment which asserted that Ballard had received "substantial income" in addition to his reported wages each year and the Government's proof which disclosed that Ballard had failed to report certain *gross receipts* from his businesses; (3) that the trial court erred in its application of the Jencks Act (18 U.S.C. §3500), by denying appellant's counsel access to certain records in the case until late in the trial; (4) that the trial court erred in receiving numerous checks into evidence as exhibits without proof of appellant's endorsement thereon; and (5) that the trial court erred in declining to answer a question submitted by the jury during its deliberations.

We have carefully reviewed the record and conclude that the conviction on count I should be affirmed, but that count II should be reversed for a new trial. Although the trial lasted for five full days, the crucial evidence bearing on this appeal can be summarized with relative brevity.

During the tax years in question, Ballard engaged in two distinct business ventures. In 1969, and, to a lesser extent in 1970, the taxpayer operated a scrap metal and

motor vehicle parts business as Ballard Auto Parts and Ballard Iron & Metal Company. He had engaged in this business for a number of years but phased it out in 1970.

In Ballard's second venture, City Leasing & Drayage Company, he operated a tractor-trailer rental business, leasing tractors and trailers and furnishing drivers to various truck lines that operated generally on a long-haul basis. This business became incorporated on July 18, 1969, and its operations after that date did not enter into the computation of Ballard's alleged understatement of income.

In each of the years in question, Ballard filed an individual income tax return on Form 1040 without attaching any Schedule C—Profit or (Loss) From Business or Profession. In his 1969 return, Ballard disclosed as income only wages received from City Leasing & Drayage Co., Inc. in the sum of $10,407. In 1970, he disclosed wages totaling $20,730, from City Leasing & Drayage Co., Inc. and from a second employer, Metropolitan Towing Co. He supported these amounts by employers' wage and tax (withholding) statements.

For the year 1969, the Government introduced evidence that Ballard Auto Parts and Ballard Iron & Metal Co. had received checks from customers for motor vehicle parts, salvage, and the like in the sum of $15,300, commission income of $330, and rental income of $850. The Government proved these amounts by calling as witnesses customers of Ballard who had issued checks to Ballard Auto Parts and Ballard Iron & Metal in amounts which totaled the figures noted above and which the Government tabulated into a summary of alleged gross income of Jack Ballard doing business as Ballard Auto Parts and Ballard Iron & Metal for calendar year 1969.

In its investigation of City Leasing & Drayage Co. to July 18, 1969, the Government discovered deposits of

nearly $46,000 in checks to a bank account at the Northwestern Bank & Trust Company. In checking these deposits, the Government attributed about $7,000 to non-income items and attributed the balance of almost $39,000 as gross receipts of the business of City Leasing & Drayage Co. Ballard reported none of these receipts on his 1969 income tax return. The Government further verified the receipt of about $12,000 of this latter amount by calling customers of Ballard as witnesses. They testified to issuing checks to Ballard doing business as City Leasing & Drayage. *See* n.2 *infra.*

For the year 1970, the Government's summarization disclosed that Ballard Auto Parts and Ballard Iron & Metal had received $3,222.52 for sales of salvage and motor vehicle parts to customers and $2,550 in rental income from third parties for a total "Alleged Gross Income Not Reported" of $5,772.52.

Ballard testified on his own behalf and stated that fires had destroyed his business records and that he had in fact sustained a loss in his businesses during each of the two years in question. He stated he had told Mrs. Dorothy Benigno, a bookkeeper who had prepared his tax returns, that his records had been burned and that he had sustained losses in his businesses for those two years. Ballard quoted Mrs. Benigno as stating that if he could not produce records showing a loss, there was no point in claiming a loss on his tax returns.

With regard to the operation of his salvage and parts business, Ballard, in essence, admitted cashing approximately $11,000 of the checks produced by the Government and stated that he needed the cash in the operation of his business. He said that he paid cash for used cars and converted these cars to scrap after salvaging useable parts and testified that he spent all cash receipts in operating this business. With respect to the leasing company, Ballard testified generally that his expenses exceeded his gross receipts.[2]

The principal issue on this appeal focuses upon appellant's contentions that he sustained a business loss for the years in question and that the Government could not establish its case by mere proof of gross receipts but was required to demonstrate Ballard's receipt of income, measured by gross receipts less expenses. To prove the violation, the prosecution contends that it need only show a willful failure to report gross receipts from a trade or business.

In *Siravo* v. *United States*, 377 F. 2d 469 (1st Cir. 1967), the indictment charged taxpayer with violations of §7206 (1), and with failure to file a tax return under §7203. The indictment was phrased in terms of willfully failing to disclose "substantial *gross receipts* from a business activity * * *." (Emphasis added.) The proof established that the taxpayer operated as a subcontractor assembling jewelry components for various manufacturers and that he failed to disclose any gross receipts from that business in his tax returns for several years. No evidence surfaced as to the amount of any costs or expenses sustained by the taxpayer. In affirming the conviction, the court said that a tax return that "omits material items necessary to the computation of income is not 'true and correct' within the meaning of section 7206." *Id.* at 472.

This circuit has addressed analogous issues in *United States* v. *Lodwick*, 410 F. 2d 1202 (8th Cir.), *cert. denied*, 396 U. S. 641 (1969), and *United States* v. *Engle*, 458 F. 2d 1017 (8th Cir. 1972). Taxpayers were both charged with §7206(1) violations and in both cases we made clear that

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[2]Witnesses who had identified checks issued to City Leasing & Drayage Co. testified that the checks represented a payment of the total charge for rental of the tractor-trailer and use of the driver, out of which appellant would have to pay the driver and such operating expenses as gasoline, maintenance, insurance, upkeep, and other items.

under §7206(1), the Government did not need to establish an actual tax deficiency in a §7206(1) prosecution. The burden rests upon the taxpayer to disclose his receipts and claim his proper deductions. In both *Engle* and *Lodwick*, taxpayers received moneys that clearly were income. *See also United States* v. *Romanow*, 509 F. 2d 26 (1st Cir. 1975); *United States* v. *DiVarco*, 484 F. 2d 670 (7th Cir. 1973); *United States* v. *Jernigan*, 411 F. 2d 471 (5th Cir. 1969).

In this indictment, the Government alleged that Ballard received "substantial income" in addition to the amounts which he disclosed on his tax returns. The Government here contends that all gross receipts represent income which must be reported.

But gross receipts may or may not represent income, depending on the circumstances. As the late Circuit Judge Johnsen observed in *Clark* v. *United States*, 211 F. 2d 100 (8th Cir. 1954):

> Of course, gross income and not gross receipts is the foundation of income-tax liability, for it is only earnings, profits and gains which the statute subjects to tax. And manifestly, gross receipts cannot be called gross income insofar as they consist of borrowings of capital, returns of capital, or any of the other items which • • • the Internal Revenue Code • • • has excluded from gross income. But when all of these things have duly been taken into account, no matter by what process it has been done, the amounts remaining of Gross Receipts necessarily may, in its character as a result, properly reflect taxpayer's Gross Income, which it is his duty to report. [*Id.* at 102.]

In the early tax case of *Doyle* v. *Mitchell Bros. Co.*, 247 U. S. 179 (1918), the Court said:

> Whatever difficulty there may be about a precise and scientific definition of "income," it imports, as used here, something entirely distinct from principal or capital either as a subject of taxation or as a measure of the tax; conveying rather the idea of gain or increase arising from corporate activities. As was said in *Stratton's Independence* v. *Howbert*, 231 U. S. 399, 415: "Income may be defined as the gain derived from capital, from labor, or from both combined."
>
> Understanding the term in this natural and obvious sense, it cannot be said that a conversion of capital assets invariably produces income. If sold at less than cost, it produces rather loss or out-go. Nevertheless, in many if not in most cases there results a gain that properly may be accounted as a part of the "gross income" received "from all sources"; and by applying to this the authorized deductions we arrive at "net income." In order to determine whether there has been gain or loss, and the amount of the gain, if any, we must withdraw from the gross proceeds an amount sufficient to restore the capital value that existed at the commencement of the period under consideration. [*Id.* at 185.]

The general term "income" is not defined in the Internal Revenue Code. Section 61 of the Code, 26 U.S.C. §61, defines "gross income" to mean

> all income from whatever source derived, including (but not limited to) the following items:
>
> (1) Compensation for services, including fees, commissions, and similar items;
>
> (2) Gross income derived from business;
>
> • • •
>
> (5) Rents[.]
>
> • • •

Treasury Regulation §1.61-3 (1976) explains "Gross income derived from business" and reads in part:

> (a) In general. In a manufacturing, merchandising, or mining business, "gross income" means the total sales, less the cost of goods sold, plus any income from investments and from incidental or outside operations or sources.

Applying these definitions to the respective contentions made by the parties, it appears that the Government makes too broad a claim in asserting that gross receipts invariably measure income or gross income. Conversely, the appellant's argument that all business expenses must be deducted from gross receipts to measure income or gross income defines income too narrowly.

In count I (1969), Ballard's gross receipts from his leasing operations of trucks and truck-trailers (City Leasing & Drayage Company) amounted to almost $39,000, and commissions and rentals received incident to his scrap business amounted to $1,180. These receipts clearly constituted items of gross income which Ballard was required to report pursuant to §61 of the Code. However, the approximately $15,000 which Ballard received from the sales of salvage and motor vehicle parts did not entirely represent gross income for in the merchandising of scrap and motor vehicle parts, Ballard's gross income excluded the cost of goods sold. Treas. Reg. §1.61-3. However, since Ballard could not produce records of his salvage and parts business for 1969 and 1970, the Government had no means of showing Ballard's cost of goods for those years.[3]

[3]The 1968 closing inventory as reflected by the Schedule C attached to Ballard's 1968 income tax return showed a small inventory of approximately $2,000, which presumably was carried over to 1969 and could be deducted from the gross receipts of the salvage and parts business in ascertaining gross income or gross profit from that business in 1969.

Gross receipts necessarily represent a starting point in ascertaining gross income. Although some of Ballard's gross receipts from his parts and salvage business for the year 1969 may not have been gross income, as we have already observed, Ballard received about $39,000 in gross receipts from his leasing business and over $1,000 as commissions and rental income—all of which clearly constituted gross income and should have been reported. Additionally, the documentation provided by Ballard's tax returns for the two years prior to 1969 strongly implied that a substantial part of the receipts from the salvage and parts operations for 1969 represented gross income.[4]

The Government's burden here is less than in a tax evasion case. In the latter, the prosecution must show taxpayer's receipt of taxable income. *United States* v. *Romanow*, 509 F. 2d 26, 28 (1st Cir. 1975); *United States* v. *DiVarco*, 484 F. 2d 670 (7th Cir. 1973); *United States* v. *Jernigan*, 411 F. 2d 471, 473 (5th Cir. 1969). The prosecution's burden here is similar to that in a failure to file case in which evidence of unexplained receipts shifts to the taxpayer the burden of coming forward with the amount of offsetting expenses. *See Siravo* v. *United States, supra*, 377 F. 2d at 473-74. Thus, the evidence of unexplained receipts here established a prima facie case of taxpayer's failure to disclose substantial amounts of gross income.

Our examination of the record discloses that the district court did not instruct the jury that in a merchandising business gross income means gross receipts less costs of goods

[4]Ballard's 1967 and 1968 tax returns, which were admitted into evidence show the following: In 1967, Ballard Iron & Metal had gross sales of almost $79,000, less cost of goods sold of about $53,000, for a gross income or gross profit of about $26,000. In 1968, Ballard Iron & Metal made gross sales of over $41,000 but the cost of goods sold amounted to $27,000, resulting in gross income (or gross profit) of about $14,000.

sold.[5] The taxpayer did not request such an instruction and its absence caused no prejudice to the appellant as to count I (1969 return) since the evidence disclosed substantial omissions in the reporting of taxpayer's gross income from nonmerchandising and merchandising businesses.

We are, however, concerned about the conviction on count II for there the Government relied on sales receipts of the salvage and parts business in the sum of approximately $3,000, plus rental income of approximately $2,500, to show omission of gross income and to prove a willful failure to report "substantial income" in addition to wages.

Ballard in 1970, sought to liquidate his salvage yard operation. Testimony established that at least one sale of salvage in the sum of $500 represented a bulk sale of inventory. Although Ballard could not document his opening inventory for the year 1970, nor other costs of the goods sold, the fact that Ballard was liquidating his scrapyard suggests that a substantial part of the gross receipts from that sale of salvage and parts probably represented Ballard's carry-over inventory. Moreover, the appellant offered evidence that he had received the rental income from individuals who were apparently sublessees and that he incurred substantial offsetting expenses in paying his own landlord.

The jury deliberated about nine and one-half hours and requested and received a rereading of the instructions. The Government presented a substantially weaker case to support the 1970 violation (count II) as compared to the 1969 violation (count I). Thus, the absence of an instruction defining gross income under Treas. Reg. §1.61-3, as it relates to the merchandising business may have prejudiced

[5]The Government failed to cite Treas. Reg. §1.61-3 to this court. We must assume that it also failed to call this regulation to the attention of the district court.

appellant materially.[6] Under the circumstances related here, the interests of justice require that we consider the omission of the special definition of gross income as it applies to the merchandising business as constituting plain error. Thus we vacate the conviction on count II and remand for a new trial on that count should the Government be interested in further prosecution.[7]

II. *Other Issues.*

The appellant contends that the district court erred in not permitting his counsel to cross-examine Internal Revenue Agent Henry Purk concerning expenses incurred in the truck leasing business after Purk had testified on direct examination that he had ascertained gross receipts from an examination of taxpayer's bank records relating to City Leasing & Drayage Company and that the account also disclosed some expenses of Ballard's operations.

In sustaining the Government's objections to the questions as irrelevant, the court recognized that proof of expenses bore upon the issue of willfullness since the appellant claimed that he sustained a loss and did not realize that he was required to report gross income items if he did not intend to claim a loss. However, the court ruled, in essence, that appellant's counsel could call Agent Purk as his own witness during the appellant's case, treating Purk as a hostile witness rather than pursue the matter on cross-examination. According to the record made outside the jury's presence, Agent Purk would have testified that after

[6]Otherwise, the court appropriately defined gross income as "* * * all income from whatever source derived, including, but not limited to the following items:

1. Gross income derived from business
2. Rents
3. Compensation for services, including fees, commissions, and similar items.

[7]This reversal affects only the taxpayer's total fine as the sentence otherwise runs concurrently on counts I and II.

deducting expenses as shown by the bank account, the operations of City Leasing & Drayage produced a profit of approximately $12,000. Appellant's counsel did not choose to call Agent Purk for additional testimony.

Although the court very well might have permitted appellant's counsel to cross-examine Purk on the expense issue during the prosecution's case as related to the issue of taxpayer's willful intent, the district court's exercise of its discretion to the contrary in the context of this case did not amount to prejudicial error. The court's ruling fell within its broad discretion in regulating the order of presenting evidence at the trial. *See United States* v. *Webb*, No. 75-1791 (8th Cir., Apr. , 1976).

The appellant also objects to the receipt in evidence of certain checks which did not bear the genuine endorsement of Ballard or his wife. The evidence established, however, that the checks in question were made payable to Ballard or to his business. Others may have endorsed Ballard's name on these particular checks. Those checks represented only a relatively small portion of the receipts of Ballard's salvage and parts operation. Ballard admitted that either he or his wife signed and cashed checks representing about $11,000 of the approximately $15,000 received in the salvage business. We see no clear error here and in any event, if any error existed, the appellant suffered no prejudice through this ruling.

Ballard also claims the court erred in refusing to respond to questions asked by the jury during its deliberations.[8] The trial court answered the first question upon agreement of the parties but in its discretion properly declined to search the transcript to obtain a specific answer

[8]The jury asked two questions. The first, "(1) May we have the dates of the fires?" was answered by the court. The second question and the one which the court declined to answer read: "(2) When did he [Ballard] say he knew the records were destroyed?"

to the second question. The court advised the jury to answer the second question from its collective recollection of the evidence. The district court committed no error in this ruling.

We have also examined other contentions raised by the appellant. They are without substantial merit.

Accordingly, we affirm on count I, and for reasons heretofore stated, reverse and remand on count II.

A true copy.

Attest:

CLERK, U.S. COURT OF APPEALS, EIGHTH CIRCUIT.

APPENDIX E

EXHIBIT A

[NEWSPAPER ARTICLE—By Theodore C. Link of the Post-Dispatch Staff]
(Post—February 12, 1970)

• • • • • • • •

DERELICT-CAR TOW TRUCK FIRES

—from page one

of business except that he had taken the precaution of hiding three additional towing trucks in an undisclosed site.

"I was riding along thinking I was making the city happy and the Mayor happy in getting the derelicts off the streets," Cillo told the Post-Dispatch.

"After I leased the lot from Ballard I filled it and another lot of mine with about 500 derelicts and was disposing of them rapidly. I was towing about 30 to 35 cars a day off the public streets and also off private property when the proper clearance was obtained," he said.

Cillo said that in December Ballard called and said he would have to cancel the lease because he wanted to go back into the salvage business.

"He was very nice about it, but it certainly threw me for a loss when he ordered me evicted by Jan. 1. I had moved out all but 40 derelicts when Ballard said he would buy 120 from me, which I moved back into his yard. Unfortunately, I did not have a written lease with Ballard, just an agreement."

Cillo said that he reported the telephone harrassment and the fire destroying his tow trucks to William Trantina, director of public safety, who is in charge of the city's towing program.

Cillo said he had installed dusk-to-dawn lights and had hired security guards for his lots at night. He and the other employees can protect the daily operation, Cillo said.

Estimating that his company had hauled 2000 derelicts off public and private property since Aug. 1, Cillo said that whoever was trying to run him out of business obviously had a market for scrap iron and steel.

"Our business is hauling derelicts away at $6 a car and we have been selling the scrap at $9 a ton. We sell the scrap to Laclede Steel and Luria at Alton and Wood River under an agreement, although prepared scrap now brings $18 to $19 a ton. We were notified yesterday that we would be paid $14 a ton hereafter," Cillo said.

Cillo said that when the fire was started among a pile of upholstered seats last week a city official was at the scene within 10 minutes and gave Cillo a notice for violating regulations on air pollution.

Cillo said he thought gasoline was used in burning the trucks and rigs, but the bombing and arson squad of the St. Louis Police Department expressed the opinion that kerosene was used. They said the trucks were so thoroughly soaked that lighting the fire would have endangered the arsonist if it had been gasoline.

Ballard, who operates the City Leasing Co., freight haulers and salvage dealers in the 3000 block of North Broadway, gave police a reason for Giardano's and Leisure's presence on the premises.

He said that Giardano had once done him an important favor and that Leisure was a friend of Giardano's. The gangsters do not show in the ownership of the leasing company but are active in managing it.

Maj. John A. Doherty, chief of detectives, arrested two men who were cutting up parts of four stolen cars with a cutting torch at Ballard's salvage yard. A warrant was refused by the circuit attorney's office.

However, one of the automobiles was from Illinois and federal authorities will be asked to look into the case. One of the men arrested is a relative of Leisure's.

Another firm, Metropolitan Towing Co., is used primarily by the police for towing illegally parked cars, but it tows some derelicts. Cillo specializes in derelicts. Last year the City Service Co. had a towing contract at $10 a car, but that contract was canceled.

APPENDIX F

EXHIBIT B

[LETTERHEAD OF BROWN, FITZGERALD & DORSEY]

May 27, 1977

Leonard J. Frankel, Attorney at Law
8019 Forsyth Boulevard
Clayton, Missouri 63105

Re: Investigation of Matters Pertaining to:
Mr. Jack Ballard
Date of Assignment: 5/20/77
Our File No.: 1317

INVESTIGATION REPORT

5/20/77 Conference at the offices of Attorney, Leonard Frankel, discuss and receive assignment, open file.

5/24/77 As per discussion with Attorney Leonard Frankel and in line with objectives discussed, this investigator did proceed to 1907 Kienlen Avenue, said location being Brocks Used Auto Parts and Salvage Yard, and therein, contact a Barry Brockman. On explaining to Mr. Brockman the purpose of this investigators visit, and that it was relative to his knowledge of Jack Ballard and any transactions business wise, specifically regarding purchase or sale of items or business transactions between himself and Mr. Ballard, specifically the years 1967 thru 1971, however, more specifically the years 1969 and 1970. Mr. Brockman did

state that he would be happy to discuss the situation with this investigator.

In the course of discussion, Mr. Brockman indicated that he has known Jack Ballard for some possibly ten to fifteen years on a friendship and business basis. Mr. Brockman went onto relate that at a point in time previous to 1967, when Mr. Ballard had been in the salvage or parts business, there had been considerable business transactions between them.

Mr. Brockman, however, went onto relate that to his recollection in the period from 1967 to 1971, with specific reference to 1969 and 1970, he could not make a definite statement as to dollar amount of transactions but feels confident that in any given year, the transactions would not have totaled more than $500, maximum. On questioning Mr. Brockman more specifically, he indicated that, by this, he meant that he doubts that he would have bought more than $500 in any given year from Jack Ballard and on the reverse, he doubts that he would not have sold more than $500 worth of parts or merchandise in any given year in this period, to Mr. Ballard.

Mr. Brockman related, on inquiry, that he believes most of the transactions to have been invoiced or paid by check, both check from him and check from Jack Ballard to him.

Mr. Brockman further volunteered that in more recent time, he believes approximately 1972 or 1973, however, remembers that after he had moved to his present location of 1907 Kienlen, that he did buy some racks from Mr. Ballard, Mr. Brockman turning and pointing to racks behind his counter, stating that on moving into this

location, he had needed space to store parts and had purchased a lot of racks that Jack Ballard had for sale.

The preceeding information obtained in discussion and interview of Mr. Brockman at his place of business during the course of the business day, when investigator asked if there was possibly time to sit down and dwell on the subject or discuss more in depth and get a recorded statement from Mr. Brockman, he indicated apologetically that, as I could see with phones ringing and him being somewhat busy, he did not have the time to take away to discuss more in depth or to give a recorded statement. He went onto relate that he did not feel that he could add anything other than the previous statements, in as much as, the transactions between 1967 and 1971 between he and Mr. Ballard had been minimal. In the course of the previous discussion, two individuals in close proximity, were subsequently identified by Mr. Brockman as his brothers, and in his turning to discuss and explain the situation to them, they concurred that there were minimal transactions between Mr. Ballard and Brocks Auto Parts between 1967 and 1971. Mr. Brockman was thanked for his time and interview closed with investigator departing the area.

Investigator proceeding from Brocks Auto Parts on Kienlen Avenue to the Liberty Auto Salvage location, specifically being 3628 Cass Avenue, St. Louis, Missouri, did, within the premesis, contact a Mr. Arthur Schwartz, son of Mr. Manual Schwartz. On investigator relating the purpose for being there and circumstances, Mr. Arthur Schwartz said that it would be (he, Arthur) that

this investigator would need to speak to, however, the time with his father, Manual Schwartz being gone and being busy over the counter, at this time was inconvenient. Mr. Arthur Schwartz indicated he had no objection to discussing the situation and giving a recorded statement to this investigator, however, suggested that it be the following day around 1:00 PM. Investigator, accordingly, made tentatve arrangements for the interview on the following day, approximately 1:00 PM and did depart the area.

On departure of Liberty Auto Salvage, investigator did proceed to Rich's Auto Parts, located at 8100 Hall Street, St. Louis, Missouri. On arriving at that location, investigator did contact within a Mr. Richard Drake, owner of Rich's Auto Parts. Mr. Drake was advised as to the circumstance and purpose of this investigators visit and indicated that he was amenable to discussing the situation and to give a recorded statement relative to the discussion. Accordingly, this investigator and Mr. Drake did, at his place of business, discuss his knowledge and business transactions with Mr. Jack Ballard. Mr. Drake related that he has known Jack Ballard for approximately some fifteen years and is friendly towards or considered Jack Ballard a friend. When questioned as to his knowledge of Mr. Ballard buying from other salvage yards, Mr. Drake responded by stating that he would assume it to be a fact or certainty, but as to his knowledge, he would only have direct knowledge of the transactions between Jack Ballard and himself or more specifically, the respective businesses of Jack Ballard and himself.

A recorded statement (recording cassette enclosed) was taken of the discussion with Mr. Drake with his knowledge and permission. The synopsis of the interview taped with Mr. Richard Drake is as follows:

Mr. Drake stated he has known Jack Ballard for approximately ten to fifteen years, as indicated, and further stated that he has done business with Jack Ballard on numerous occasions throughout the time that he has known him or they both have been in businesses to where it was possible to do business together. He specifically stated that at a time when Jack Ballard was in the parts or salvage business, there would have possibly been more dollar amount or more business transactions between them. He, however, did state that in the period from 1967 to 1971, including specifically 1969 and 1970, there were transactions probably totaling around $1000 a year of purchase and sale between he and Jack Ballard. Meaning specifically that in any given year during this time period, he had probably sold around approximately $1000 worth of merchandise to Jack Ballard but had also purchased approximately $1000 at maximum in any given year of items from Jack Ballard. Mr. Drake indicated that the transactions would have certainly been invoiced and the payment mode would have been by check or some other record form.

Mr. Drake indicated that he does not recall specifics or the actual circumstances nor the time of occurrence, but he does recall some mention by Jack Ballard of a fire occurring at one of Jack Ballards business locations at some point prior to the trial.

Mr. Drake indicated that, although, he cannot immediately find his inventory cards, as they are probably stored away, he would, however, have invoice books that he would make available if someone cared to go over them that would establish exactly the dollar amount of purchase and sale between he and Mr. Ballard. Mr. Drake further indicated, on inquiry, that, although, he appeared in the proceedings against Mr. Jack Ballard as a prosecution witness, relative to doing business or buying items from Jack Ballard, no one ever probed or asked him if he had made sales to Jack Ballard or anything relative to the dollar amounts of said sales or what time period they took place in.

The preceding is basically the text of the interview with Mr. Richard Drake.

On concluding the discussion and taped interview with Mr. Drake, investigator did depart the premesis and return to this firms offices.

5/25/77 Investigator proceeding, this date, to the location of Liberty Auto Salvage, 3628 Cass Avenue, per previous arrangement, did discuss and interview Mr. Arthur Schwartz relative to this matter. After discussing the situation somewhat with Mr. Arthur Schwartz, this investigator, with his knowledge and permission, did tape the interview or discussion of statements by Mr. Schwartz as follows:

Mr. Arthur Schwartz did state that he had known Jack Ballard for approximately fifteen years, and in knowing him for this length of time, had known Mr. Ballard to be the owner of various businesses, primarily towing and/or salvage

businesses. Mr. Schwartz further related that at a time when Jack Ballard was in the salvage or parts business, it is entirely possible that the dollar amounts would have been greater as to transactions between their two respective businesses. He related, however, that in the period from 1967 to 1971, he would estimate broadly that in any given year in this time period, the transactions would have totaled some where between $500 and $1000 as purchases from Jack Ballard. Mr. Schwartz also related that it would probably even out, in that, on the other side Jack Ballard had probably purchased approximately $500 to $1000 in any given year of items or business transactions to where he was paying money to Liberty Auto Salvage. Mr. Schwartz indicated that these transactions were probably primarily paid by check, either with Liberty Auto Salvage being the paying firm or Jack Ballard being the paying firm.

Mr. Schwartz stated that it is entirely possible that he could have, at the time, had some knowledge or recollection or something being mentioned by Jack Ballard or other parties as regards a fire at property owned by Jack Ballard, however, he does not specifically recall any information regarding same at this time.

Mr. Schwartz indicated that, although, not immediately available and somewhat time consuming, he feels that from his firms records, an exact dollar amount could be established as to purchases made from Jack Ballard, and on the reverse, sales made to Jack Ballard for the indicated time period.

The preceding being the basic information or statements obtained from Mr. Arthur Schwartz, on termination of interview and the taped interview, this investigator did depart the premises.

Investigator departing Liberty Auto Salvage, did proceed to the location of B & B Bookkeeping Service, 2907 North Kingshighway, St. Louis, Missouri. Within said location, investigator did contact a Mrs. Dorothy Benigo, partner and owner of B & B Bookkeeping Service. Investigator explaining the purpose of the visit and the desired subject of discussion to Mrs. Benigo, did get the response that she had always considered Jack Ballard a friend and she would be happy to discuss the matter or anything this investigator wanted and to willingly allow the conversation to be taped.

As previously indicated, the tape with the recorded interviews is enclosed with this Investigation Report. The synopsis of interview text with Mrs. Benigo is that having known Jack Ballard for some approximately fifteen years or more, she has, to her knowledge, whenever Mr. Ballard has had a business operation, kept the books or done his bookkeeping work for him. Mrs. Benigo stressed several times the fact that when in business, to her knowledge, Jack Ballard had always kept good records and been very conscientious about getting his forms and necessities to her for his bookkeeping service. Mrs. Benigo went onto relate that at the time in question relative to Jack's trial, etc., she related that she had not been keeping books for him, and accordingly, had assumed that he was just not in business. She further related that she had kept no records

or had no information to keep records, as previously stated, she was not doing any work for Mr. Ballard and assumed that his business had been sold to a Mr. Fred Adelstein.

When inquired of as to conversations with Mr. Ballard and him informing her of a fire at his business location and that records had been destroyed, Mrs. Benigo stated that she did not recall Jack having mentioned same to her. When informed that Mr. Ballard stated that he had mentioned same several times right up to the immediate time prior to trial, she stated that she did not recall same, however, if she could converse with Mr. Ballard, possibly circumstances he could relate would refresh her memory. Mrs. Benigo stated that she was never, at any time, at any of Jack Ballards business locations, that her bookkeeping service had always had his records brought in by himself or some other person, and their conversations or meetings relative to business had always been at her place of business.

The preceding is the basic information contained within the interview of Mrs. Benigo.

Investigator, concluding the interview with Mrs. Benigo, did depart the premesis returning this firms offices.

Investigator contacting Attorney, Leonard Frankel, did make arrangements, and accordingly proceed to said attorney's office, and therein, discuss the circumstances and statements of Barry Brockman, Arthur Schwartz, Richard Drake and Dorothy Benigo.

5/26/77 Investigator proceeding this date, to the location of Loban Iron & Metal, same being 2817 Martin

Luther King Drive, did therein, contact Mr. Harry Adelstein. Investigator, explaining the circumstances and desired topic of discussion to Mr. Adelstein with his wife Mrs. Adelstein and son, identified as Barry Adelstein, being present, Mr. Adelstein did state that he had testified in court, and a transcript of said testimony should be available and he did not see the point in any further discussion. While in the premesis, Mrs. Adelstein did pick up the telephone and contact their attorney, identified as Mr. Bernard Susman, and then turning to this investigator request that he pick up the telephone, with her still on the line, and converse with Mr. Susman. The substance of the discussion with Mr. Susman on advisement being made as to the matter of desired discussion was that Mr. Susman advised this investigator to proceed through his offices and did advise Mr. Adelstein not to make any statement or not to engage in any discussion relative to the matter. Investigator, did accordingly, on Mr. Adelstein's refusal to discuss the matter, depart the premesis.

Investigator on departing Loban Iron & Metal, did proceed to the location of St. Louis Towing Service, located at 15 Angelica Street. Arriving said location, investigator did ask for and subsequently contact Mr. Jay Cillo. Mr. Cillo, not being within the building at said location, was contacted via radio by the lady on investigator inquiring for same. Mr. Cillo driving up a few moments later in a wrecker type two truck, did proceed to remain seated in the wrecker and pull up close to this investigator, conversing with same from the seated position within the truck

through the window. On investigator explaining the desired area of discussion and what the purpose of visit was, Mr. Cillo proceeded to state that he would have to discuss the matter with his attorney before making any statements or engaging in any interview or discussion.

Mr. Cillo did, in the course of conversation, proceed to make the statement that he was presently under investigation and had given his attorney enough headaches of late, that he did not care to contact him and inquire whether or not to discuss the situation with this investigator.

Mr. Cillo, in continuing the conversation with this investigator, even though refusing to grant a recorded statement, did say "I don't see the purpose, what specifically do you want to discuss?" On investigator relating that it involved the question of rent or leasing and the time period of the lot situated on North Broadway belonging to Mr. Jack Ballard and other areas of interest, did again decline to discuss the matter. Mr. Cillo, however, related that he was still looking for rent receipts to show the period of time for which he had rented the property.

Mr. Cillo was informed that investigator also wished to discuss the circumstances relative to a fire occurring at the location and possibly the destroying within the fire of records belonging to Mr. Jack Ballard. Mr. Cillo responded by stating that there had been several fires at the location, however, they had been in automobiles or trucks belonging to him and that he does not recall any fire occurring in the building at that location. He further related that he did not recall any records having been within said building,

and certainly, to his knowledge, no records were stored in a viewable position, if they were there, they then would possibly have been in some location unknown to him. Mr. Cillo did go onto state that, on being asked by this investigator, that there was, to his knowledge, no fire occurring while he was renting the premesis from Mr. Ballard in any building on the premesis.

As indicated, Mr. Cillo refused to make a recorded statement or to discuss or grant an interview, however, did continue to prolong the conversation, getting into areas of desired discussion, somewhat tentatively, even though indicating he was not going to do so.

At one point, Mr. Cillo made the statement that "if I talk to you, you're liable to consider or I'm liable to perjur myself." It was pointed out to Mr. Cillo, if he had told the truth previously, then certainly the retelling of same could not constitute any purjury. Interview was concluded with Mr. Cillo stating that in the near future he would converse with his attorney who he identified as a Mr. Richards, and if his attorney advised accordingly, he would contact this investigator regarding a statement and/or discussing the situation desired. Investigator departed the premesis, returning this firms offices.

Contact with attorney, advisement to date made with Mr. Frankel, and investigator proceeding to and discussing the situation making advisement of circumstances to date to Mr. Frankel.

5/27/77 Dictation and transcribing of report for client.

END OF INVESTIGATION REPORT

[LETTERHEAD OF BROWN, FITZGERALD & DORSEY]

May 27, 1977

Leonard J. Frankel, Attorney at Law
8019 Forsyth Boulevard
Clayton, Missouri 63105

Re: Investigation of Matters Pertaining to:
Mr. Jack Ballard
Date of Assignment: 5/20/77
Our File #: 1317

STATEMENT

Services:	18.7 hours @ $14.00 per hour (As per attached Investigation Report), to include services from May 20, 1977 thru May 27, 1977, conference with attorney, discussion and receiving assignment, opening of file, interviewing of Brockman, Schwartz, Drake, Benigo and attempted interviews of Cillo and Adelstein. Together with conversations with client and Ms. Mary Ballard, together with receipt of long distance telephone call and conversation with Mr. Jack Ballard relative to this assignment, together with dictation and transcribing and investigative efforts.	$261.80
Expenses:	Automobile & Parking (127 miles @ 20¢ per mile)	25.40
	Parking	.50
	Cassette Recording	1.50
	Total Amount Due	$289.20

Thank You!

APPENDIX G

UNITED STATES DISTRICT COURT
For the Eastern District of Missouri
Hon. John F. Nangle, Judge

EXCERPT OF TRANSCRIPT OF TESTIMONY

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JASPER PAUL CILLO, being produced, sworn and examined in behalf of government, testified as follows:

Direct Examination

By Mr. Birkby:

Q. Would you please state your name?
A. Jasper P. Cillo.
Q. What is your business address?
A. 15 Angelica.
Q. What is your occupation?
A. Towing company and salvage business.
Q. Do you know the defendant, Jack Ballard?
A. Yes, sir.
Q. Now, if you see him in the courtroom would you

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point him out and describe what he's wearing?
A. Blue jacket or blue coverall, coat.
Q. How long have you known Mr. Ballard?
A. Oh, I'd say about fifteen years.
Q. In what capacity have you known Mr. Ballard?
A. Well, in dealing with scrap iron and in, you know, dealings and as a friend, you know, through my family.
Q. Now, have you ever had occasion to rent any property from Mr. Ballard?
A. Yes, sir, I rented a piece of property on 3901 North Broadway.
Q. Do you recall when you rented that property?

A. It was in—I rented it for four months in 1969 into 1970.
Q. Do you recall what the months were that you rented it?
A. October, November, December, and then right into '70, January—or in November, right in through there.
Q. To whom did you pay the rental on that property?
A. To Mr. Ballard.
Q. In what form did you pay that rental?
A. Cash.
Q. What was the amount of the rental?
A. Four hundred twenty-five dollars a month.

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Q. How often did you pay this cash to Mr. Ballard?
A. The first day of every month.
Q. For the four months that you have indicated?
A. Right.
Q. To whom would you deliver the money?
A. To Mr. Ballard.
Q. Mr. Cillo, do you recall the exact date when you commenced renting this property?
A. I think it was October, October 1st.
The Court: What year?
The Witness: '69.
Q. (By Mr. Birkby) Mr. Cillo, do you recall giving an affidavit to the Internal Revenue Service?
A. The best of my knowledge; that's been some time ago.
Q. And at the time that you gave that affidavit, would your recollection have been fresher than it is now?
A. At that time, yeah.
Q. Mr. Cillo, I would like to ask you to take a look at this affidavit and ask you if your signature appears on the bottom of that affidavit.
A. Yeah, yes, sir.

Q. Is that the affidavit that you gave to the Internal Revenue Service?

A. Yes, sir.

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Q. And at the time that you gave that affidavit, I'd like to ask you—have you look at that affidavit and see if that refreshes your recollection as to when you commenced renting this property.

A. Yes, sir, this is the exact year, November to February. I'm just away by one month. It was four months total.

Q. November 1st?

A. Right, November 1st.

Mr. Birkby: Thank you.

I have no further questions.

The Court: Mr. Baris?

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